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14
15 UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF WASHINGTON

17 SELAH ALLIANCE FOR EQUALITY,
18 COURTNEY HERNANDEZ, REV.
19 DONALD DAVIS JR., LAURA PEREZ,
20 ANITA CALLIHAN, KALAH JAMES,
21 CHARLOTTE TOWN, AMANDA
22 WATSON, and ANNA WHITLOCK,
Plaintiffs,

23 vs.

24 CITY OF SELAH; SHERRY
25 RAYMOND, in her official capacity as
26 Mayor of the City of Selah; and DONALD
27 WAYMAN, in his official capacity as City
Administrator for the City of Selah,

28
29 Defendants.

30 Case No. 1:20-cv-3228

DEFENDANTS' RESPONSE
TO PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

- Page 1

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1 The City¹ responds as follows to Plaintiffs' Motion for Preliminary
 2 Injunction:

3 **I. INTRODUCTION**
 4

5 The Plaintiffs' motion is almost entirely an attack on a straw man.
 6 Plaintiffs' factual recitations and legal arguments focus on the hallowed status of
 7 political speech under the First Amendment, the strict scrutiny applied to content-
 8 based laws regulating speech, the constitutionality of Selah's "political sign"
 9 ordinance (SMC 10.38.050), and actions taken by the City during the summer and
 10 fall of 2020 to enforce SMC 10.38.050 at a time the City believed the regulation
 11 was constitutional. But last summer, after communicating with Plaintiffs' counsel
 12 and examining *Reed v. Town of Gilbert*, 576 US 155 (2015), the City conceded
 13 SMC 10.38.050 is facially unconstitutional and ceased enforcing it. Consistent
 14 with this concession, Defendants admitted in their Answer to Plaintiffs' Complaint
 15 that SMC 10.38.050 is facially unconstitutional, and the City is in the process of
 16 amending its sign regulations to eliminate SMC 10.38.050. Given this, the
 17 constitutionality of SMC 10.38.050 is moot (see discussion of mootness, *infra*)
 18 and, to the extent Plaintiffs seek a preliminary injunction relative to SMC
 19 10.38.050, Plaintiffs' motion should be denied.

20 The City is enforcing its sign regulation that prohibits all free-standing
 21 signs, regardless of message or content, in the public right-of-way. (SMC
 22 10.38.100). Thus, the relatively narrow issue before the court is the
 23 constitutionality of that provision.

24
 25
 26
 27
 28
 29 ¹ Throughout this brief, unless otherwise indicated, Defendants are referred to
 30 collectively as "the City".

1 Because SMC 10.38.100 is content-neutral, advances significant City
 2 governmental interests, and leaves Plaintiffs ample alternative channels for
 3 communicating their message and beliefs, the regulation passes First Amendment
 4 muster. Thus, to the extent Plaintiffs' motion asks the court to prohibit the City
 5 from removing all free-standing signs, including Plaintiffs', from the public right-
 6 of-way, the motion should be denied.²
 7

8 II. FACTS

9 A. Genesis and root cause of dispute between Plaintiffs and the 10 City

11 The tensions that underlie this lawsuit germinated in June of 2020, in the
 12 wake of George Floyd's death and subsequent Black Lives Matter (BLM)
 13 demonstrations that occurred in Portland, Seattle and other parts of the country.
 14 On June 6, 2020, outside BLM members or supporters, joined by a much smaller
 15 number of Selah residents, brought BLM's message and methods to Selah in the
 16 form of a march. Decl. of Donald Wayman, pp. 4-6, p. 8, ll. 18-20. At that event,
 17 Selah City Administrator Donald Wayman was approached by a woman he did
 18 not recognize, and who did not identify herself. Decl. of Donald Wayman, p. 8,
 19 ll. 18-20. Mr. Wayman later learned the person was Holly Cousens, the Assistant
 20 Mayor of the City of Yakima. Decl. of Donald Wayman, p. 8, ll. 19-20, p. 9, ll.
 21 1-2. Ms. Cousens asked Mr. Wayman what his personal opinions were of the
 22 BLM march. Id.

24
 25 ² Based on the breadth of their statement of facts and supporting declarations, one
 26 might assume Plaintiffs are mounting a selective enforcement and "as applied"
 27 challenge to the City's sign regulations. However, in a footnote to their brief on
 28 page 10, Plaintiffs concede that, in requesting preliminary injunctive relief, they
 29 are bringing only a facial challenge. Thus, the issue before the court is whether
 30 that portion of the SMC sign regulations prohibiting free-standing signs on the
 public right-of-way – SMC 10.38.100 – is facially constitutional.

1 By this point, Mr. Wayman had done a significant amount of research on
 2 BLM as a movement. Decl. of Donald Wayman, p. 9, ll. 1-3. Mr. Wayman learned
 3 through his research that BLM's national organizers, including Patrisse Cullors,
 4 had described herself as a "trained Marxist", and that BLM's stated policy
 5 objectives included disruption of the American nuclear family in favor of an all-
 6 powerful central government. Decl. of Donald Wayman, p. 9, ll. 1-6. Mr.
 7 Wayman, a retired marine colonel who spent much of his military career
 8 responding to insurgencies overseas, also could not help but notice similarities
 9 between the BLM movement in the USA and totalitarian movements in foreign
 10 nations that he had directly witnessed. Decl. of Donald Wayman, p. 9, ll. 2-10.

12 Mr. Wayman heard the marchers in Selah on June 6, 2020 shouting "No
 13 justice, no peace!", presumably in reference to the death of George Floyd. Decl.
 14 of Donald Wayman, p. 9, ll. 11-12. Mr. Wayman found this perplexing, in his
 15 position as City Administrator, given that Selah had never had any problems with
 16 brutality or racism by its police force. Mr. Wayman observed that the marchers
 17 included several school-aged children, who seemed to be mindlessly parroting
 18 slogans fed to them by adults. Decl. of Donald Wayman, p. 9, ll. 11-12.

20 When Ms. Cousens asked for Mr. Wayman's personal opinion, he opined
 21 that the march looked reminiscent of a communist indoctrination effort. Decl. of
 22 Donald Wayman, p. 9, ll. 17-20. This was Mr. Wayman, as a citizen, voicing his
 23 personal opinion on some of the tenants and methods of BLM as an organization.

25 Unfortunately, Ms. Cousens posted a distorted account of Mr. Wayman's
 26 comments on Facebook. Decl. of Donald Wayman, p. 10, ll. 7-8. Among other
 27 things, Ms. Cousens implied that Mr. Wayman had threatened her and the
 28 marchers with a concealed weapon, which was a fabrication. Declaration of
 29 Donald Wayman, p. 10, ll. 7-9.

30 DEFENDANTS' RESPONSE TO PLAINTIFFS'
 MOTION FOR PRELIMINARY INJUNCTION

- Page 4

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1 The reaction of BLM and its supporters to Ms. Cousens' Facebook post was
 2 swift and predictable. Because Mr. Wayman had the audacity to criticize BLM as
 3 a movement, and voice his disapproval of some of its beliefs and methods, he was
 4 vilified and attacked. See Declaration of Donald Wayman, pp. 11-12. Some or
 5 all of the Plaintiffs were part of that effort, which continues.³

6 If one theme emerges from the preliminary injunction record, it is that
 7 Plaintiffs' activities in Selah since June 6, 2020 have been motivated in very large
 8 part by an intense animus toward Mr. Wayman.

9 **B. Plaintiffs' Other Activities in Selah**

10 Not all of the activities of the Plaintiffs and/or their supporters in Selah have
 11 been the peaceful advancement of "equity and inclusion." The messages that
 12 Plaintiffs and/or their supporters chalked on Selah streets and sidewalks were often
 13 vicious personal attacks against Mr. Wayman and other members of the City's
 14 workforce, including the Mayor, the City attorney, and the Selah Police

16 ³ In the wake of Ms. Cousens' Facebook post, the Plaintiffs and/or their supporters
 17 wrote letters, emails and on-line posts, demanding that Mr. Wayman be summarily
 18 fired. They slandered Mr. Wayman as a supposed pedophile, via flyer-style signs
 19 they placed on light posts and via messages throughout the City. Declaration of
 20 Donald Wayman, p. 11, ll. 10-20. Mr. Wayman regularly experienced hang-up
 21 calls and threatening messages on his office telephone. Id. Suspicious packages
 22 and items began appearing on the front porch of Mr. Wayman's private residence.
 23 Individuals created at least two websites assailing Mr. Wayman personally and
 24 trying to get him fired. Id. The City's official Facebook page was filled with
 25 inflammatory comments and efforts to generate a lawsuit, to the point it had to be
 26 de-activated. Declaration of Donald Wayman, p. 12, ll. 1-2. In response to this
 27 de-activation, someone created imposter Facebook pages for the City and the
 28 Selah Police Department, and used those pages to spread disinformation and
 29 divisive rhetoric. Declaration of Donald Wayman, p. 12, ll. 1-4. When Mr.
 30 Wayman traveled after hours to an event at a park in Yakima, he was met by
 uninvited individuals who chalked the ground with hateful messages and
 eavesdropped on the entire event. Declaration of Donald Wayman, p. 12, ll. 2-6.

1 Department. Declaration of Donald Wayman, p. 12, ll. 7-13. In addition to
 2 drawing chalk penises and sexually insulting images, individuals wrote chalk
 3 comments such as “Fuck SPD”, “SPD is guilty”, and “SPD is racist, sexist,
 4 homophobic, transphobic”. Declaration of Donald Wayman, p. 12, ll. 7-17.
 5

6 **C. Plaintiffs’ BLM “Demands” to City**

7 On June 15, 2020, approximately one week after the first march in Selah,
 8 Plaintiffs delivered a written list of “demands” to the Mayor. Declaration of
 9 Donald Wayman, p. 12, l. 20, p. 13. Ll. 1-4. The Plaintiffs’ list was labeled “Selah
 10 Black Lives Matter Protestor Demands”. Declaration of Donald Wayman, p. 13,
 11 ll. 5-6. Among other things, the Plaintiffs demanded “re-direction of [Selah’s]
 12 police funding towards other agencies” “removal of any ‘Selah’ police presence
 13 from school grounds.”, Declaration of Donald Wayman, p. 13, ll. 5-10, “re-naming
 14 a major city street after Martin Luther King, Jr.” and making “investments in
 15 community social services, education, after-school programs, mental health
 16 services, [and] housing”. Declaration of Donald Wayman, p. 13, ll. 5-12.

18 **D. City’s Reaction to Plaintiffs’ “Demands” and Subsequent**
 19 **Protests in front of Mayor’s Restaurant**

20 The Mayor, Sherry Raymond, did not submit to the Plaintiffs’ tactics or
 21 demands. Instead, on June 17, 2020, she issued a “Proclamation” that recognized
 22 residents’ right to lawfully engage in free speech, stated the City’s policy of not
 23 discriminating against political rallies or against rally attendees based on their
 24 views, affirmed the City’s support of Mr. Wayman as City Administrator, and
 25 emphasized the importance of black people and all human life. Declaration of
 26 Donald Wayman, p. 13, ll. 16-17, p. 14, ll. 1-16.

28 When the Mayor did not fire Mr. Wayman as the Plaintiffs demanded,
 29 Plaintiffs and/or their supporters set about trying to disrupt the Mayor’s local
 30

DEFENDANTS’ RESPONSE TO PLAINTIFFS’
 MOTION FOR PRELIMINARY INJUNCTION

- Page 6

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1 restaurant, King's Row. Declaration of Donald Wayman, p. 15, ll. 1-2. They
 2 repeatedly protested in front of the restaurant, and sometimes on the business
 3 grounds. Id. They shouted at customers, called the Mayor vicious things (such as
 4 pedophile protector), and spread other lies and hatred. Declaration of Donald
 5 Wayman, p. 15, ll. 2-5.⁴
 6

7 **E. Plaintiffs' Additional Demand to City**

8 In July and August 2020, the Plaintiffs, this time through their attorneys,
 9 issued more demands to the City. Declaration of Donald Wayman, p. 16, ll. 3-4.
 10 Mr. Wayman, the Mayor, and the City Attorney, Rob Case, had an in-person
 11 meeting at City Hall with attorneys from the Perkins-Coie firm. Declaration of
 12 Donald Wayman, p. 16, ll. 5-13. In addition to demanding that the City forever
 13 allow the Plaintiffs to draw in the middle of City streets, the attorneys insisted that
 14 the City establish and fund a non-profit corporation to help the Plaintiffs organize
 15 and advocate. Id. In effect, they demanded the City set up something similar to
 16 the S.A.F.E. group. Id. Mr. Wayman, the Mayor, and the City Attorney regarded
 17 that demand as completely unrealistic, similar to the Plaintiffs' defund-the-police
 18 demands, because the City cannot expend taxpayer funds to benefit any particular
 19 advocacy group. Id.

20 **F. Actions/Statements of the City Relative to Chalk Marking**

21 After Plaintiffs and/or Plaintiffs' supporters began marking City streets and
 22 sidewalks with chalk, the City, initially through its Chief of Police and later via
 23
 24

25
 26 ⁴ Plaintiffs and/or their supporters have also attacked the City Attorney, Rob
 27 Case. On Facebook, individuals accused Mr. Case of stalking women and little
 28 girls throughout town and said that the Selah Police Department had supposedly
 29 "confirmed" that he had done so. Declaration of Donald Wayman, p. 15, ll. 7-
 10. See also Declaration of D. R. "Rob" Case.

1 the City Attorney, issued multiple letters articulating the City's position that
 2 chalking City streets and sidewalks constituted criminal mischief under RCW
 3 9A.48.090(1)(b). Declaration of Donald Wayman, p. 16, ll. 16-18. While the
 4 Plaintiffs claim the City, in those letters "threatened to criminally prosecute the
 5 individuals for said chalk", ECF 029, p. 7, ll. 18-19, p. 18, 3-4, in reality the City
 6 Attorney's June 30, 2020 letter was much softer. Therein, the City Attorney stated
 7 the City had not prosecuted anyone, had merely warned individuals, and that the
 8 City did not desire to prosecute anyone over chalk writing and marking. The City
 9 Attorney went on to indicate that the City would consider the matter closed so long
 10 as Perkins-Coie's clients (the Plaintiffs) did not again create unauthorized graffiti
 11 on public property. Declaration of Donald Wayman, p. 17, ll. 1-9.
 12

13 In response to the City Attorney's June 30th letter, the Plaintiffs amplified
 14 their efforts. They continued chalking City streets and sidewalks, and began
 15 chalking City buildings such as City Hall and the Municipal Courthouse.
 16 Declaration of Donald Wayman, p. 17, ll. 10-12. On one occasion in mid-2020, a
 17 future S.A.F.E. member used aerosol-based spray chalk on a City sidewalk in front
 18 of the Civic Center to create a Soviet-style hammer and sickle and write "Black
 19 Lives Matter". Declaration of Donald Wayman, p. 17, ll. 10-14, p. 18, l. 1.
 20 Aerosol-based spray chalk is similar to spray paint, and to remove that "drawing"
 21 City workers had to sandblast the sidewalk and apply a new concrete skim coat.
 22 Declaration of Donald Wayman, p. 18, ll. 1-3.
 23

25 In an effort to reach a compromise, the City Attorney, on July 16, 2020,
 26 issued a letter to Plaintiffs' attorneys at Perkins-Coie. Declaration of Donald
 27 Wayman, p. 18, ll. 4-8. The letter advised the Plaintiffs that the usage of traditional
 28 stick chalk on City sidewalks/walkways would be allowed, but that the City would
 29

30 DEFENDANTS' RESPONSE TO PLAINTIFFS'
 MOTION FOR PRELIMINARY INJUNCTION
 - Page 8

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1 not permit the Plaintiffs to use aerosol-based spray chalk or to write on City
 2 buildings. Id.

3 Significantly, the City has not prosecuted anyone for chalking or marking
 4 City property. Declaration of Donald Wayman, p. 18, ll. 9-10. Rather, the City
 5 has only pled with the Plaintiffs to comply with the law and to tone down their
 6 methods and tactics. Declaration of Donald Wayman, p. 18, ll. 9-11.
 7

8 **G. Actions of City Relative to Enforcement of City Sign**
 9 **Regulations**

10 **1. “Political” Sign Ordinance – SMC 10.38.050**

11 At times, during the summer of 2020, the City removed a small number of
 12 the Plaintiffs’ signs from public property because of the City’s belief in the
 13 constitutionality of SMC 10.38.050, addressing “political” signs. Declaration of
 14 Donald Wayman, p. 21, ll. 16-19. But in October 2020, Plaintiffs’ attorney
 15 challenged the facial constitutionality of SMC 10.38.050, calling the City’s
 16 attention to *Reed v. City of Gilbert*. The City reevaluated its position on the
 17 constitutionality of SMC 10.38.050, and came to the conclusion that, based on
 18 *Reed*, the regulation was, indeed, facially unconstitutional. Declaration of Donald
 19 Wayman, p. 19, ll. 11-20. In the wake of that determination, the City took no action
 20 against the Plaintiffs’ signs throughout the remainder of the fall 2020 political
 21 season, and the Plaintiffs’ signs were allowed to exist unattended on City-owned
 22 rights-of-way alongside true political signs. Declaration of Donald Wayman, p.
 23 21, 15-20, p. 22, ll. 1-3.
 24

25 **2. Free-standing signs on public right-of-way-SMC 10.38.100**

26 After the Plaintiffs filed their Complaint (in December 2020), Plaintiffs
 27 resumed placing signs in public rights-of-way. Declaration of Donald Wayman,
 28
 29

1 p. 22, ll. 7-8. This began in early 2021, long after the fall of 2020 political season
2 had ended. Declaration of Donald Wayman, p. 22, ll. 8-9.

3 SMC 10.38.100 prohibits all free-standing signs in public rights-of-way.
4 Declaration of Donald Wayman, p. 23, ll. 1-5. The City's executive branch of
5 government has a legal obligation to enforce its municipal laws, including the sign
6 regulations. Declaration of Donald Wayman, p. 23, ll. 17-20. Accordingly, City
7 employees, including Mr. Wayman, removed, and continue to remove those signs
8 from the public right-of-way.

9
10 Plaintiffs claim that, until recently, the City, in practice, allowed "free-
11 standing signs" in public rights-of-way. See ECF 029, p. 2, ll. 23-24. But the City
12 has never allowed free-standing signs on public rights-of-way (other than true
13 political signs during political seasons under the now known to be unconstitutional
14 SMC 10.38.050, and the Plaintiffs' signs during the fall 2020 campaign season).
15 Declaration of Donald Wayman, p. 29, ll. 3-7. Mr. Wayman has been the City
16 Administrator for six years, and throughout those years any free-standing signs
17 discovered in public rights-of-way have been removed by the City with reasonable
18 promptness. Declaration of Donald Wayman, p. 29, ll. 7-9. While Mr. Wayman
19 has personally removed some of those signs over the years, more commonly the
20 removal is done by City Public Works personnel. Declaration of Donald Wayman,
21 p. 29, ll. 7-12.
22
23

24 Action spreadsheets spanning from 2016 through the present, attached as
25 Exhibit A to the declaration of City Code Enforcement Officer Erin Barnett,
26 document many the occasions when she or another City employee removed (or
27 required a citizen to remove) unlawful free-standing signs. Declaration of Donald
28 Wayman, p. 30, 1-5. Declaration of Erin Barnett, Exhibit A. And, contrary to
29 Plaintiffs' claims of unequal enforcement (see e.g. ECF 029, p. 2, l. 24), the City's
30

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

1 enforcement vis-à-vis unlawful free-standing signs has been uniform throughout
2 the years. Declaration of Donald Wayman, p. 30, ll. 5-7. Regardless of message
3 or messenger, the City removes unlawful free-standing signs from public rights-
4 of-way. Declaration of Donald Wayman, p. 30, ll. 7-14.

5 With respect to Plaintiffs' express or implied assertion that the City's
6 removal of free-standing signs from the public right-of-way has been inconsistent
7 and sporadic, City personnel are not required to become, and cannot become
8 omnipresent. Declaration of Donald Wayman, p. 33, ll. 6-10. The City is not
9 required to prevent violations before they occur, whether the violation is of a speed
10 limit or a sign regulation. Id. At most, the City is required to act within a
11 reasonable time of discovering a violation and having an opportunity to respond.
12 Id. And that is precisely what the City does. Id.

13 The City's Code Enforcement Officer does not work on weekends.
14 Declaration of Donald Wayman, p. 33, ll. 11-20. Thus, if an unlawful sign is
15 placed on a Friday evening or during the weekend – as the Plaintiffs have
16 repeatedly done – the earliest the Code Enforcement Officer can act on those signs
17 is the following Monday morning (if the signs have not already been removed by
18 the Plaintiffs or third-parties.) Declaration of Donald Wayman, p. 33, ll. 11-15.
19 On occasion Mr. Wayman has encountered unlawful free-standing signs during a
20 weekend and has removed them, rather than allowing the violation to persist until
21 Monday morning. Declaration of Donald Wayman, p. 33, ll. 15-18. But he is not
22 always in town on weekends, and when he is in town on the weekends he does not
23 examine every public right-of-way. Declaration of Donald Wayman, p. 33, 15-
24 20.

25 In light of the above, it is possible that unlawful free-standing signs placed
26 at certain times, such as on a weekend, a weekday night, or when the Code
27

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

- Page 11

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1 Enforcement Officer is on vacation or consumed with other matters, might remain
 2 standing longer than signs placed at other times. Declaration of Donald Wayman,
 3 p. 34, ll. 3-6. But that does not negate the City's responsibility to enforce SMC
 4 10.38.100, or render it unconstitutional. Declaration of Donald Wayman, p. 34,
 5 ll. 5-7.

6 With regard to Plaintiffs' claim that the City's removal of free-standing
 7 signs from the public right-of-way has been selective or discriminatory, the City
 8 has removed, and continues to remove, all signs from the public right-of-way when
 9 it discovers them, including signs posted by a group called "FALSE". Declaration
 10 of Donald Wayman, p. 35, ll. 16-20, p. 36, ll. 1-20, p. 37, ll. 1-9. See also
 11 Declaration of Donald Wayman, p. 37, ll. 10-16.

12 Plaintiffs claim that the "parking strips" along Selah's two main
 13 thoroughfares (i.e. First Street/Highway 823 and Jim Cements Way/Highway 823)
 14 are traditional public fora in Selah. ECF 029, p. 12, ll. 24, p. 13, ll. 13. But free-
 15 standing signs have never been allowed on parking strips in Selah – which exist
 16 on public rights-of-way. Declaration of Donald Wayman, p. 38, ll. 11-12. That is
 17 because of SMC 10.38.100, which expressly prohibits free-standing signs on
 18 public rights-of-way, including, but not limited to parking strips. Declaration of
 19 Donald Wayman, p. 38, ll. 11-14.

20 Selah's parking strips, which, again, exist on public rights-of-way, are
 21 designed as vegetation beds, and the only structures the City has ever allowed
 22 within the parking strips are overhead light posts and official government signs,
 23 such as traffic signs. Declaration of Donald Wayman, p. 38, 19-20, p. 39, l.1. The
 24 City's Public Works personnel devote considerable time each week to maintaining
 25 the parking strips to enhance aesthetics. And allowing free-standing signs to be
 26 posted in the parking strips detracts from aesthetics, interferes with watering and
 27 DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1 mowing, impedes the view of drivers on the street, potentially adversely impacts
2 adjacent businesses, and tend to obscure vehicle ingress and egress locations. See
3 recitation of City's reasons for prohibiting free-standing signs in parking strips,
4 set forth in the Declaration of Donald Wayman on pages 39 through 45.

III. ARGUMENT AND AUTHORITY

A. Preliminary Injunction Standard(s)

To obtain a preliminary injunction, a plaintiff must demonstrate that “(1) [he] is likely to succeed on the merits of [his] claim; (2) [he] is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of hardships in [his] favor; and (4) a preliminary injunction is in the public interest.” *Int’l Franchise Ass’n. Inc., v. City of Seattle*, 803 F.3d 389, 399 (9th Circ. 2015, citing *Winter v. NRDC Inc.*, 555 US 7, 20, 129 S. Cet. 365, 172 L.Ed. 2d 249 (2008)). Whether the plaintiff is likely to succeed on the merits is a threshold inquiry. “[W]hen ‘a plaintiff has failed to show the likelihood of success on the merits [the court] need not consider the remaining three *Winter* elements.’” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Circ. 2015, quoting *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*) 729 F.3d 937, 944 (9th Circ. 2013).

Preliminary injunctive relief is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter, supra*, at 22, citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L.Ed. 2d 162 (1997). In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter, supra*, at 24, quoting *Amoco Production Co.*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L.Ed. 2d 542 (1987).

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

- Page 13

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1 As “an extraordinary and drastic remedy”, *Lopez v. Brewer*, 680 F.3d 1068,
 2 1072 (9th Circ. 2012) *citing Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct.
 3 1865, 138 L. Ed. 2d 162 (1997), a preliminary injunction “should not be granted
 4 unless the movant, by a clear showing, carries the burden of persuasion. *Id.*
 5

6 A preliminary injunction can be either prohibitory or mandatory. A
 7 prohibitory injunction “prohibits a party from taking action” preserving the *status*
 8 *quo* until the action is decided on the merits. *Marlyn Nutraceuticals Inc. v. Mucos*
 9 *Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Circ. 2009). On the other hand, a
 10 mandatory injunction orders a party to act in a way that goes beyond maintenance
 11 of the *status quo* and “is particularly disfavored.” *Id.* at 879. Mandatory
 12 injunctions are generally not granted unless “extreme or very serious damage will
 13 result and are not issued in doubtful cases or where the injury complained of is
 14 capable of compensation and damages.” *Id.*
 15

16 The 9th Circuit employs a “sliding scale” approach to preliminary
 17 injunctions. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th
 18 Circ. 2011). “Under this approach, the elements of the preliminary injunction test
 19 are balanced, so that a stronger showing of one element may off-set a weaker
 20 showing of another.” *Id.*

21 **B. Mootness of Plaintiffs’ Motion Relative to SMC 10.38.050**

22 A trial court may properly deny a motion for preliminary injunction if the
 23 issue is moot. “A case becomes moot when it has ‘lost its character as a present,
 24 live controversy.’” *Idaho Rivers United v. Hudson*, 173 F.Supp.3d 1027, 1031 (D
 25 Idaho 2016), partially quoting *Oregon v. FREC*, 636 F.3d 1203, 1206 (9th Circ.
 26 2011).

27 “[T]he repeal, amendment, or expiration of challenged legislation is
 28 generally enough to render a case moot and appropriate for dismissal.” *Board of*
 29 **DEFENDANTS’ RESPONSE TO PLAINTIFFS’**
MOTION FOR PRELIMINARY INJUNCTION
 30 - Page 14

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1 *Trustees of the Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198
 2 (9th Circ. 2019).

3 While voluntary cessation of alleged illegal conduct does not automatically
 4 deprive the tribunal of power to hear and determine a case, see *County of Los
 5 Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979), an
 6 issue is moot if the defendant demonstrates that the challenged conduct cannot
 7 reasonably be expected to reoccur. *Adarand Constructors, Inc. v. Slater*, 528 U.S.
 8 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000). A change in administrative
 9 policy that accepts a plaintiff's free speech arguments renders the claim moot. See,
 10 e.g. *White v. Lee*, 227 F.3d 1214, 1242-44 (9th Circ. 2000).

12 In the instant case, the City has conceded that its "political" sign regulation,
 13 SMC 10.38.050 is facially unconstitutional, and has even admitted that in its
 14 Answer. Thus, the constitutionality of that provision is moot, and, to the extent
 15 Plaintiffs' motion for preliminary injunction relates to the constitutionality of that
 16 provision, it should be denied.

18 **C. Application of Winter Factors**

20 **1. Plaintiffs are unlikely to succeed on the merits because the sign
 21 regulation that the City is currently enforcing – SMC 10.38.100 -
 22 is content-neutral, advances legitimate, significant City interests,
 23 and leaves the Plaintiffs ample alternative means of expressing
their message and beliefs.**

25 In *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236
 26 (2015), the court addressed the constitutionality of a city sign ordinance that
 27 included numerous content-based restrictions and exclusions, including
 28 restrictions for "ideological signs[s]" and "political sign[s]". 576 U.S. at 159-160.
 29 In holding that the ordinance violated the First Amendment because the provisions
 30 DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1 of the sign code at issue were clearly content-based, the court said this about a
2 content-neutral prohibition against signs on public property:
3

4 The town has ample content-neutral options available to
5 resolve problems with safety and aesthetics. For example,
6 its current code regulates many aspects of signs that have
7 nothing to do with the sign's message: size, building
8 materials, lighting, moving parts, and portability. (Code
9 citation omitted.) And on public property, the town may
10 go a long way toward entirely forbidding the posting of
11 signs, so long as it does so in an even-handed, content-
12 neutral manner. See *Taxpayers for Vincent*, 466 U.S. at
13 817, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (upholding-neutral
14 ban against posting signs on public property). (emphasis
15 added)

16 576 U.S. at 173.
17

18 The 9th Circuit has recognized and followed this guidance from *Reed*
19 regarding the content-neutral prohibition of signs. In *Lonestar Sec. and Video,*
20 *Inc. v. City of L.A.*, 827 F.3d 1192 (2016) the court considered the constitutionality
21 of city ordinances regulating mobile billboards. After finding that the regulations
22 at issue were content-neutral, the court held that the regulations survived First
23 Amendment scrutiny because they were narrowly tailored to advance a significant
24 government interest, and the ordinances left open adequate alternative
25 opportunities for expression. On the significant government interest issue, the
court observed:

26 The Supreme Court and this court have repeatedly
27 confirmed that local governments may exercise their
28 police powers to advance these goals [traffic control,
29 public safety, and aesthetics] by prohibiting intrusive or
30 slightly forms of expression. See *Taxpayers for Vincent*,

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

- Page 16

Evans, Craven & Lackie, P.S.
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1 466 U.S. at 808; *GK, Ltd. Travel v. City of Lake Oswego*,
2 436 F.3d 1064, 1072-73 (9th Circ. 2006). Instead, we focus
3 on whether the mobile billboard regulations are narrowly
tailored to the city's interest.

4 827 F.3d at 1200.

6 On the significant government interest of eliminating visual blight and
7 promoting aesthetics, the court stated:
8

9 None of the ordinances in this case are “substantially
10 broader than necessary” to accomplish the city’s goals of
11 eliminating visual blight and promoting the safe and
12 convenient flow of traffic. Controlling case law compels
13 our conclusion that the city’s interest in aesthetics alone
14 justifies the ordinances. See *Taxpayers for Vincent*, 466
15 U.S. at 808 (holding that a total restriction on a certain type
16 of visual advertising is narrowly tailored because, by
17 banning the type of signs that the city determined to
18 constitute “visual clutter and blight,” the city “did no more
19 than eliminate the exact source of evil it sought to
20 remedy”). Under this binding precedent, it is therefore
21 enough that the appellees believe that the advertising
22 displays prohibited by the mobile billboard regulations
23 detract from the city’s overall appearance; the outright ban
24 directly serves this stated interest.” (emphasis added)

25 827 F.3d at 1201.

26 Here, the provision of the SMC relating to “free-standing signs” which the
27 City is enforcing against all signs located in the public right-of-way is content-
28 neutral and narrowly tailored to accomplish the City’s goals of eliminating visual
29 blight, and promoting aesthetics, business development and success, and traffic
30 safety.

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

- Page 17

Evans, Craven & Lackie, P.S.
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1 On the alternatives for expression issue, the *Lonestar* court recognized that,
2 to satisfy the First Amendment, a time, place, and manner regulation must “leave
3 open ample alternative channels for communication.” 827 F.3d at 1201, quoting
4 *Clark v. Comty. For Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065,
5 82 L. Ed. 2d 221 (1984). In holding that the ordinances at issue did that, the court
6 stated:

7 [T]he First Amendment does not guarantee the right to
8 communicate one’s views at all times and places or in any
9 manner that may be desired. *Heffron v. Int’l Society for*
10 *Krishna Consciousness Inc.*, 452 U.S. 640, 647, 1010 S.
11 Ct. 2559, 69 L. Ed. 2d 298 (1981). However, a restriction
12 on expressive may be invalid if the remaining modes of
13 communication are inadequate. *Taxpayers for Vincent*,
466 U.S. at 812.

14 The mobile billboard ordinances leave open adequate
15 alternative opportunities for advertising. The challenged
16 regulations foreclose only one form of expression –
17 mobile billboards – by placing limited restrictions on the
18 types of vehicles to which those mobile billboards may be
19 affixed for any vehicles whose primary purpose is
20 something other than advertising and the manner in which
21 billboard advertisements can be displayed on a motor
22 vehicle (in a permanent fashion and no larger than the
23 dimensions of the vehicle). Appellants are free to
24 disseminate their messages through myriad other
25 channels, such as stationary billboards, bus benches,
26 flyers, newspapers, or handbills. Appellants may also
27 paint signs on vehicles and attach decals or bumper
28 stickers. Although mobile billboards are a unique mode
29 of communication, nothing in the record suggests that
30 appellants’ over-all “ability to communicate effectively is
threatened.” *Taxpayers for Vincent*, 466 U.S. at 812.
(emphasis added)

827 F.3d at 1201.

DEFENDANTS’ RESPONSE TO PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION

- Page 18

Evans, Craven & Lackie, P.S.
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1 Here, a free-standing sign placed in the City right-of-way is not the only
 2 way an individual or organization can convey a message, political or otherwise, in
 3 the City of Selah. The Plaintiffs and others are free to express their ideas through
 4 marches, signs, banners, speeches, press conferences and chalk marking, and
 5 Plaintiffs have done all of that in Selah. They are also free to communicate their
 6 ideas on social media, and Plaintiffs have done that as well. Indeed, the portion
 7 of S.A.F.E.'s Facebook page which is open to the public boasts that S.A.F.E. has
 8 680 members, and the page includes a detailed recitation of S.A.F.E.'s political
 9 beliefs, aspirations, motives, and objectives. See Exhibit A to Declaration of
 10 Christopher J. Kerley. In sum, because the City's facially-neutral free-standing
 11 sign regulation leaves open adequate alternative opportunities for Plaintiffs and
 12 others to convey their ideas and messages, the regulation does not violate the First
 13 Amendment.⁵
 14

16 **2. Irreparable Harm**

17 The loss of First Amendment rights, where the plaintiff is likely to succeed
 18 on the merits, constitutes irreparable harm. See *Klein v. City of San Clemente*, 684
 19 F.3d 1196, 1207-08 (9th Circ. 2009). However, where the plaintiff has ample
 20 alternative means of conveying his message, the court is free to give this factor
 21
 22

23 ⁵ Following *Reed, supra*, courts from other circuits have held that content-neutral
 24 ordinances or regulations prohibiting or regulating signs on public property do not
 25 violate the First Amendment. See e.g., *Constr. And Gen. Laborers Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120 (7th Circ. 2018); *Constr. And Gen. Laborers Local Union No. 330 v. Town of Grand Chute*, 297 F.Supp.3d 850 (ED Wisc. 2018); *Signs for Jesus v. Town of Penroke*, 977 F.3d 93 (1st Circ. 2020); *Berg v. Vill. of Scarsdale*, 2020 _WL_6749825 (SDNY 2020). See also *Act Not to Stop War and End Racism Coal. v. District of Columbia*, 846 F.3d 391 (DC Circ. 2017).

1 “minimal weight” in applying the *Winter* four-part test. See e.g. *Tracy Rifle and*
 2 *Pistol LLC v. Harris*, 118 F.Supp.3d 1182, 1193 (ED Cal 2015).

3 Here, Plaintiffs are unlikely to succeed on the merits for the reasons set forth
 4 above. In addition, because Plaintiffs have ample alternative means of conveying
 5 their message in the City of Selah, this factor should be given only minimal weight,
 6 and it does not tip the scales of equity in favor of a preliminary injunction.
 7

8 **3. Balance of Hardships**

9 Again, the Plaintiffs have multiple alternative means of conveying their
 10 message in the City of Selah other than posting free-standing signs in the City
 11 rights-of-way. And, for all of the reasons set forth in the Declaration of Donald
 12 Wayman, allowing the posting of free-standing signs in the City rights-of-way by
 13 the Plaintiffs or anyone else would present multiple hardships and issues for the
 14 City, including blight, litter, interference with mowing, water and other
 15 maintenance, interfering with traffic, and potentially frustrating the success of
 16 businesses, particularly those located adjacent to parking strips.
 17

18 **4. Public Interest**

19 As recognized by the Supreme Court in *Reed, supra*, and by lower courts in
 20 other cases, particularly *Lonestar, supra*, cities have a significant public interest
 21 in promoting government interests such as those identified above. While certainly
 22 speech on political issues/issues of public concern is a freedom to be protected, it
 23 is not absolute. And, in this case, because Plaintiffs and others who wish to
 24 express/convey a political message in the City of Selah have ample ways to do so
 25 other than posting free-standing signs in the public rights-of-way, the City’s
 26 interests outweigh First Amendment concerns in this situation.
 27

1 **IV. CONCLUSION**
2

3 Based on the foregoing argument and authorities, the City respectfully
4 requests that Plaintiffs' Motion for Preliminary Injunction be denied.

5 DATED this 12th day of May, 2021.
6

7 EVANS, CRAVEN & LACKIE, P.S.
8

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